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IN THE SUPREME COURT
OF THE UNITD STATES

OCTOBER TERM, 198__

NO. 83-127

HAMMERHEAD ENTERPRISES, INC.
RONALD PRAMSCHUFER AND ROBERT JOHNSON

Petitioners

vs.

STANLEY BREZENOFF, MAYOR AND CITY COUNCIL
AND THE CITY OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this matter entered in the above case on April 28, 1983.

OPINIONS BELOW

The April 28, 1983 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported in a slip decision of the Second Circuit, Docket No. 83-7014, decided April 28, 1983, and is reprinted in the separate Appendix to this Petition, pp A-1-A46. The prior opinion of the United States District Court for the Southern District of New York, also reprinted in the Appendix, pp A-47-A-63 , is reported below as Hammerhead, et al. v. Brezenoff, et al., 551 F. Supp. 1360 (S.D.N.Y. 1982).

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1983. The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1254 (1),

and 2101(c).

QUESTION PRESENTED

Should highly placed municipal bureaucrats, via private, non-public channels of communication, under the guise of First Amendment rights of their own be permitted to stifle the First Amendment rights of others who seek to publish their views on highly controversial public issues, which touch upon and contradict the views and philosophy espoused by the bureaucrat's own municipal agency?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment and the first section of the Fourteenth Amendment which provide as follows:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This was an action brought by Hammerhead, Inc.,[1] and by Messers Pramschufer and Johnson, i.e., the inventors, owners and manufacturers of a board game entitled "Public Assistance, Why Bother Working for a Living?", to enjoin the unconstitutional, libelous and tortuous actions of the head of New York City's Human Resources Administration, and for damages against the administrator and the City of New York, following the discovery of an offending letter written by the administrator to certain commercial store

1. There are no parent companies, or subsidiaries of affiliates of Hammerhead Enterprises, Inc.

chains in the New York City area, which allegedly asked these chains to ban or boycott the game involved. The action was brought under 28 U.S.C. §1343 (3) and (4), and 42 U.S.C. §1983.

THE EVIDENCE

The evidence reveals that Stanley Brezenoff, the "Administrator/Commissioner" (i.e., the head or chief) of New York City's Human Resources Administration (a multi-billion dollar City welfare agency) wrote an official letter to the heads of 13 leading American department, book and toy chain stores, all but one of whom were headquartered in New York City, on the letterhead stationery of his agency, which clearly identified the writer as the head of the agency concerned; and as the head of the agency involved he officially requested the recipients of the letter to refrain from carrying a new board game entitled "Public Assistance, Why Bother Working for a Living?" Mr. Brezenoff stated the game unfairly slammed welfare recipients, did a "grave injustice to taxpayers and welfare clients alike," and was insensitive and shoddy and a discredit to its manufact-

urer and marketeers. He further advised the stores that their "cooperation" in "keeping this game off the shelves of your stores would be a genuine public service". Mr. Brezenoff made no public disclosure of the letter, to the public or press or to the owners of the game, but did send a copy of his letter to Mr. Edward T. Weaver, Executive Director of the American Public Welfare Association, who at the same time involved, had published a newsletter which strongly condemned the game and which outlined a similar plan of action to keep it off the market nationwide.

The evidence further revealed that the inventors of the game, who were unemployed themselves at the time, invented, published and marketed the game in the fall of 1980. The game itself was a mockery, or a satire, of the American welfare system. It showed that welfare recipients reaped welfare benefits primarily from their refusal to work, from overpayments and fraud, and often engaged in other side-line ciminal activity such as prostitution, hub-cap thievery, and illicit drug transactions. The working people of

America were depicted in the game as the dupes of the system, who were forced to pay for the scam by their honest toil and tax dollars. The game also depicted welfare administrators and officials in a very poor light. They were shown to be lazy, very tolerant of fraud, and willing to handout billions of dollars of public money, and moreover eager to justify their own ever increasing salaries, all on the basis that they were rendering assistance to the poor.

The evidence further revealed that the "controversial" aspect of the game was quickly picked up by the news-media. Patricia Harris, Secretary of Health and Human Services publicly called the game "callous, racist and sexist." The National Organization of Women condemned it; the NAACP recommended it be banned. The inventors of the game soon found themselves on the Donahue Show, as well as numerous lesser radio and TV talk shows; and the subject matter of hundreds of newspaper stories across America. Articles also appeared about the game in London, Canada and Puerto Rico.

It was at this time that Mr. Brezenoff, fearing

that the game might adversely affect pending legislation in Albany that was designed to increase welfare grants (and welfare administrators' salaries) wrote to the heads of 13 department, book and toy stores in New York City, on the official letterhead stationery of his City agency and, as the Commissioner thereof, suggested it would be in the public interest not to sell the game. Macy's department store, one of the recipients of the letter, promptly cancelled their order, and returned their unsold games to the owners. Thereafter, while the game quickly became a bestseller in small "mom and pop" stores across America and was hailed in the press and game and trade journals as an innovative, best seller, not one of the 660 department stores, bookstores, or toy stores owned or controlled by the recipients of the Brezenoff letter, or the 2500 stores who used the same "buying services" as those utilized by the 13 New York Stores that received the Brezenoff letter, purchased the game during the next ten to twelve months.[2]

2. Mr. Brezenoff admitted during his deposition (which was received in evidence) that he knew the stores to which he forwarded his letter were chain stores,

In the meanwhile, three months after the Brezenoff letter was mailed, an inquiring news reporter discovered the existence of the letter and finally forced Mr. Brezenoff's office to release a copy of it through the Freedom of Information Act, after repeated calls to Mr. Brezenoff's office for a voluntary submission of the letter failed to produce the letter in question. It was at this time, through the actions of the press, that the owners were first made aware of the existence of the Brezenoff letter. After the present law suit was filed the owners via judicial discovery, were first furnished a list of the addresses of the letter in question. It was not until this time, after the rush of free media publicity of their game had subsided and after the demand for the game had peaked, that the owners were first able to convince two of the recipients of the letter to carry

---

2. con't. and that his intent was to hurt the game not just in New York, but nationally. At the trial of the case, however, the question of damages was not litigated. Pursuant to order of the trial court, the trial was bifurcated, and only the issue of liability was litigated.

their product.

Despite repeated and pointed questions during the interrogatory stage of the law suit Mr. Brezenoff denied and repeatedly denied that he had knowledge of other efforts to ban the game, or that he had communicated with organizations or individuals regarding efforts to suppress the game. Specifically, he did not identify his "note" to Mr. Weaver, or the existence of Mr. Weaver (the Executive Director of the American Public Welfare Association), until the final day of trial when he was asked point blank on cross-examination if he knew Mr. Weaver, and if he had seen Mr. Weaver's "newsletter." It was only at that time that he first admitted that he knew Mr. Weaver, and that he was aware of his newsletter soliciting association members to ban the game; and it was not until this time that he finally admitted that he sent Mr. Weaver a copy of his letter to the 13 stores in question. Moreover, it was not until the appeal of the case to the Second Circuit, that the defendant's attorney first produced a copy of Mr. Brezenoff's "note" to Mr. Weaver, when the at-

torney handed a copy of the letter to the Court of Appeals during the argument of this appeal.

On the element of the implied threat or the possibility of such a threat in the Brezenoff letter to the 13 stores in question, the appellants proffered testimony of two witnesses, Michael Kilbert and Wallis Cooper, both of whom were on the witness stand at the time and who were long time owner-operators of two of the largest independent game and book stores in New York City, to the effect that though they were not addressees of the Brezenoff letter, they considered it threatening. It was further proffered that Mr. Kilbert would have testified that while he was not a recipient of the letter, had he known even that it existed he would have pulled the game from his shelves, even though it was a bestseller, as he viewed the Brezenoff letter as an implied threat from the City of New York. The trial court rejected both offers of proof. Mr. Michael Botti, a buyer for Brentano's testified that Brentano's was a recipient of the Brezenoff letter in the fall of 1980, and was considering carrying the game at that time but did

not do so because it felt threatened by the Brezenoff letter. The trial court found, however, that his testimony was not credible. The Court based its opinion in this regard on an effacive and self deprecating letter from the former president of Brentano's to Mr. Brezenoff shortly after the receipt of the Brezenoff letter in question, wherein the owner assured Mr. Brezenoff that Brentano's would "never" carry such a vile game as "Public Assistance."[3]

THE RULINGS BELOW

The District Court in this case ruled that Mr. Brezenoff wrote his letter in good faith because of his "concern for and support of the concept of public assistance." See page 9 of the trial court's decision, attached hereto at Appendix, p. A-14. The District Court also found that Mr. Brezenoff had, as a public official, the right to engage in free speech

3. "Never" lasted less than a year. After appellants discovered in the fall of 1981 that Brentano's had received a copy of the Brezenoff letter, they contacted the store and persuaded it to resist the City's effort to ban the game and to carry the game in their stores.

of his own, and as such, the letter was not censorship, but was an "appeal to conscience and decency." See Appendix, p.A-42.

The Court of Appeals declined to address the First Amendment issue of Mr. Brezenoff's own right to speak, since it found there was no constitutional violation. See n.6, Court of Appeals' decision, Appendix, p. A-59 . The Court of Appeals held the letter was "nothing more than a well-reasoned and sincere entreaty in support of (Mr. Brezenoff's) political perspective." And while the Court of Appeals shared the trial court's finding that the letter was "an appeal to conscience and decency" it stated that it would be equally immune from the appellants' challenge had it "been based on the views of a society which this or any court found wholly repugnant." See Appendix, p A-59.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because this decision poses a problem of tremendous magnitude for constitutional jurisprudence in this country, namely: should govenment bureaucrats under the

guise of First Amendment rights of their own be permitted to stifle the First Amendment rights of others who wish to publish their views on highly controversial public issues, which touch upon or contradict the views and philosophy espoused by the bureaucrat's own agency? To permit such censorship by Government bureaucrats, who could send out "private" letters similar to Brezenoff's would appear to invite disaster. Under this thinly veiled demagogy the Secretary of Defense could send a "private" letter on Department of Defense stationery to national book chains suggesting that it would be in the public interest to remove a particular book from the market place because it was critical of American involvement in El Salvador, or of the nuclear arms build-up, and was, in the opinion of the Secretary, scurrilous, unconscionable and indecent. Or the same type letter might come from the FBI director, or local police chiefs, the mayors of various cities, etc., soliciting "cooperation" in keeping certain views out of the market place, such as the views of the NAACP, environmental groups, or right-

to-lifers, etc.

In sum, whatever the poltical persuasion or however scurrilous or outrageous or holier than thou the writing may be, "the possibility of error inherent in the proposed (rule of law as sanctioned in the present case) poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possiblity." Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, Slip Opinion, Supreme Court of the United States, at p. 15 (Case No. 81-1839, decided March 29, 1983). Or, as stated in NAACP v. Button, 371 U.S. 415, 433 (1963): "The threat of sanctions may deter (the) exercise of (First Amendment) rights almost as potently as the actual application of sanctions."

Thus, in the present case, the possibility of recipients reading a threat into Mr. Brezenoff's invitation to join the City (i.e., to "cooperate") in removing the game from store shelves, is as potent a poison of the plaintiffs' First Amendment rights as if the threat had been expressed in plain and

unambiguous language. It is the likelihood or possibility of stores being willing to remove only one "offensive" item from their shelves, and thereby keep on good terms with high placed City officials, that is highly dangerous here. The loss of one item to the store is inconsequential; whereas the loss of the City's good graces could be disasterous. Thus, it is the possibility that some recipients of such a letter might interpret it as a threat, and thereby remove the article from their shelves, that renders Mr. Brezenoff's letter highly offensive to First Amendment rights. It is the possibility of future letters from other government bureaucrats to other publishers and sellers of books and printed matter, etc., plus the likelihood, or again the possibility, that recipients of such future letters of this nature might well view the letters as threatening, and might thus remove such "offensive" printed data from their shelves in order to remain in the good graces of the bureaucrats involved that renders it imperative that this Court strike down this potential threat to First Amendment rights.

The rule of law as sanctioned in the present case furthermore allows government bureaucrats desiring to stifle the expression of antigovernment opinion to achieve their aim by working through and with a censorship campaign planned and implemented by an association of public agencies (the APWA here) calling itself "private", but which in truth represents the precise interests of the government bureaucrats. As the law now stands, these same censorship-minded bureaucrats may take actions in accord with this "private" censorship campaign, communicate with the director of it about actions taken, and yet remain immune from damages although the net effect be the same as if the bureaucrats had designed and directed the censorship campaign themselves.

Further, if the Second Circuit ruling stands, lying by government officials about connections with such "private" censorship efforts in the discovery stage - giving the government a concealed advantage throughout the rest of the trial - will be officially sanctioned, and even encouraged.

CONCLUSION

Wherefore, Petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Earl L. Carey, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Hammerhead Enterprises, Inc., and Messers Pramschufer and Johnson, hereby certify, that pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for a Writ of Certiorari on each of the defendant appellees herein by mailing said copies, postage prepaid, to the counsel of record for such parties, i.e., George Gutwirth, Esquire, Office of the Corporation Counsel, 100 Church Street, N.Y., N.Y., on this 25th day of July, 1983.

All parties required to be served have thus been served.

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APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

81 Civ. 3054 (MP)

HAMMERHEAD ENTERPRISES, INC. RONALD PRAMSCHUFER, and ROBERT JOHNSON,

Plaintiffs,

v.

STANLEY BREZENOFF, MAYOR and CITY COUNCIL, and THE CITY OF NEW YORK,

Defendants.

DECISION AND OPINION

APPEARANCES:

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By: George Gutwirth, Esq.

Milton Pollack, District Judge.

This suit was instituted for injunctive relief and compensatory and punitive damages for alleged defamation, and interference with commercial relations and free speech. The claims were heard at a Bench trial without a jury. Jurisdiction of the Court is posited on diversity, 28 U.S.C. § 1332, and Civil Rights 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3) and (4).

The Claims Asserted

On May 20, 1981, plaintiffs instituted this suit against Stanley Brezenoff, individually and in his official capacity as Administrator of the Human Resources Administration and Commissioner of Social Services of the City of New York, against the Mayor and the City Council of New York City and against the City of New

York.

The occasion for the suit was a letter written about an adult parlor game created and marketed by the plaintiffs. On November 5, 1980, Mr. Brezenoff sent a letter to the chief executive officers of thirteen department, toy and book stores with headquarters in the greater New York area. Mr. Brezenoff's letter[1/] criticizes a so-called "spoof" -- a board game entitled, "Public Assistance: Why Bother Working for a Living?" (Public Assistance) which was invented,

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1/ The text of the letter read as follows:

> As you may know, there is a new board game on the national retail market called "Public Assistance." I am writing to urge that [ ] refrain from carrying this game in its stores.
>
> "Public Assistance" is not, as its inventors claim, a harmless spoof of welfare cheats and liberal government bureaucrats. It is an ugly and damaging slam at this society's poorest citizens, 60 percent of whom are children.

manufactured and marketed by the plain-

[Con't] A welfare family of four in New York City receives public assistance and food stamp benefits of $374 a month to cover everything -- food, clothing, utilities, carfare, and other necessities -- except rent and medical care. That works out to about $3.01 per person per day. The maximum the family can receive for rent is $218 monthly.

Besides lampooning the painful financial situation of those who struggle to get by on that amount in this economy, the game also denigrates the very real progress over the past decade in reforming administration and management of the welfare system. Locally, error rates in payment and eligibility are now a fraction of what they were just seven years ago; caseloads are down to their lowest levels since 1972; and more able-bodied welfare recipients are being removed from the rolls and put to work in productive jobs than at any other time in the City's history.

The system is still imperfect, but we are working hard to improve it, and the "welfare mess" of the old days is gone.

By perpetuating outdated myths, I believe the "Public Assistance" game does a grave injustice to taxpayers and welfare clients alike; by its insensitivity and plain shoddiness, it is a discredit to those associated with its manufacture and marketing.

Your cooperation in keeping this game off the shelves of your stores would be a genuine public service.

tiffs, Ronald Pramschufer, Robert Johnson, and Hammerhead Enterprises, Inc.[2/]

At the close of trial, the Court dismissed the claims against the Mayor of New York City, the City Council, and the City of New York as defendants; no evidence was adduced that these parties knew of the letter or were involved in the events leading to this dispute; what evidence there was in these areas was conclusive that those defendants had no knowledge or involvement in any of the matters dealt with herein. Decision was reserved as to the individual liability of Mr. Brezenoff, who, being the only one

1 Con't/ With thanks and best wishes

Sincerely,

Stanley Brezenoff
Administrator/Commissioner

2/ Hammerhead is a Maryland corporation created for the purpose of inventing and selling board games.

remaining before the Court will be referred to as the defendant.

The proof presented at the trial consisted of testimony of witnesses, depositions and exhibits. On due deliberation and weighing the evidence, circumstances and probabilities and assessing the credibility of witnesses, judgement must be entered in favor of the defendant due to the failure of the plaintiffs to carry their burden of proof to establish any of their claims by a fair preponderance of the credible evidence.

I. The Game

"Public Assistance" falls into the broad genre of parlor board games epitomized by "Monopoly". While circling the playing board, each player attempts to accumulate simulated money by remaining on welfare and avoiding work. Plaintiffs describe their game as a "spoof", "a

commercial satire" on the welfare system in that it lampoons able-bodied welfare recipients and public administrators. In essence, in Mr. Brezenoff's opinion, the game portrays welfare clients as lazy, loafing, intoxicated, dishonest, and promiscuous, describes welfare administrators as lazy dupes of the clients; and suggests that politicians indiscriminately heap benefits upon welfare recipients. The game also plainly makes derogatory reference to "ethnic lawyers" and "landlords", to crime as an income supplement to welfare benefits and to the financial benefits under the welfare system of having illegitimate children. Plaintiffs have stipulated that they have no expertise in welfare matters; that they do not consider themselves experts, or even knowledgeable about welfare issues.

At the games' inception in the early fall of 1980, the plaintiffs did

not allocate any funds for advertising nor did they have a formal marketing or media strategy. Nonetheless, plaintiffs testified that they hoped and anticipated that some individuals would enjoy and support the game while others would oppose it. Plaintiff Johnson testified that the game concerned a great public issue in this country and that it would elicit response. Plaintiffs attempted to evoke this response in October 1980 by contacting local Maryland newspapers to request that they publish articles concerning the game. Moreover, Mr. James Dunnigan, plaintiffs' expert on the marketing of games testified that the game was highly marketable due to its controversial nature: it would appeal to some and turn others off.

Some of those who were turned off publicly voiced their opposition, dis-

pleasure and disgust concerning the game and its tart message prior to November 5, 1980. Secretary of Health and Human Resources, Patricia Harris, publicly deplored the game "as callous, sexist and racist," and as a "vicious brand of stereotyping". Carl Snowden, a leader of a local anti-poverty group in Annapolis, Maryland, pronounced the game "obnoxious and close to bordering on racism". Snowden was quoted as calling for the Maryland and Washington National Association for the Advancement of Colored People to consider a boycott of the game. The game has attracted negative comment from the National Organization for Women and from the National Association of Social Workers.

The game, plaintiffs' statements to the media and the above and other public reactions generated widespread media coverage of the controversy sur-

rounding the game. Stories concerning the game and its criticism were reported locally in many cities and nationally by the Associated Press. Plaintiff Johnson and Carl Snowden appeared on the nationally televised "Donahue segment" of the "Today Show" prior to November 5, 1980 to comment and be interviewed on the game and the political and social views espoused thereby. Some of the media coverage mentioned possible boycotts of the game.

The individual plaintiffs both testified that they believed that the statements found on the game board and on cards contained in the game -- in their opinion -- accurately or nearly accurately portrayed abuses that existed in the welfare system. They further contended that they sought to exploit and lampoon these alleged abuses to make money from the sale of their game.

Based on the exhibits, the testimony of witnesses including that of the plaintiffs and an assessment of the credibility of that testimony, the Court finds that by the plaintiffs' own conduct they have thrust themselves into the general public controversy and its political and social ramifications concerning welfare and into the forefront of the specific public controversy concerning the appropriateness and good taste of board games and pretended "spoofs" that reflected on and criticized the recipients of and manner in which public assistance is afforded, administered and used. Plaintiffs' purpose was to foment that controversy by taking a distinct political and social position in order to influence and augment sales of the game. During the fall of 1980, the plaintiffs had repeated and continuing access to lo-

cal and national media and were in position to promote and defend their game against attacks.

II. Purpose and Intent of the Brezenoff Letter

Acting on his own initiative, with the editorial assistance of his secretary, Stanley Brezenoff, on his official stationery of Administrator/Commissioner of the Human Resources Administration, wrote the form letter quoted at footnote 1 above to thirteen chief executives of retail establishments consisting of department, toy and book stores in the New York City area on November 5, 1980.[3/] On its face there is nothing libelous in the

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3/ The stores are: Abraham and Strauss; Alexander's; B. Altman & Co.; Bloomingdales; Gimbel's; Hammacher-Schlemmer; Lord & Taylor; Macy's; Saks Fifth Avenue; F.A.O. Schwartz; Brentano's; Barnes and Noble; and Toys-R-Us.

the letter, nor are the words and phrases defamatory or those normally used to intimidate or threaten. The plaintiffs nonetheless claim to be particularly offended by the last two paragraphs of the letter:

> By perpetuating outdated myths, I believe the "Public Assistance" game does a grave injustice to taxpayers and welfare clients alike; by its insensitivity and plain shoddiness, it is a discredit to those associated with its manufacture and marketing.
>
> Your cooperation in keeping this game off the shelves of your stores would be a genuine public service.

Whether or not these paragraphs are libelous, tortious or of a quality that threatens or intimidates the letter's recipients depends on an examination of the totality of the circumstances surrounding the letter and its effect and by contemplation of the writer's intent and the reaction of its recipients.

There is no credible evidence that the defendant acted out of spite or with ill-will toward any of the plaintiffs. He did not know the plaintiffs; he was unfamiliar with the game prior to encountering it at a social cocktail party in late October 1980, in Washington, D.C.; he had no knowledge concerning the marketing of games in general or of "Public Assistance" in specific.

The Court finds that Mr. Brezenoff was motivated in good faith by his concern for and support of the concept of public assistance and his desire to rebut undeserved barbs and factual representations made by the game that he considered to be erroneous, derogatory, unfair and counterproductive. The Brezenoff letter was well within the scope of his station as the top administrator of public assistance in New York

City to comment on controversies surrounding public assistance recipients or administrators. The game was released at a time when there was nationwide controversy and partisan hostility to welfare benefits in general and when important State legislation was pending. The defendant had frequently engaged in the public debate concerning public welfare in the media and by lecturing on the subject. He had the responsibility to express Agency policy on social service issues and the integrity of its administration and to inform the public concerning the programs of his Agency.

The Court sees nothing sinister in the defendant's chosen avenue for comment on the game.[4/] Plaintiffs complain

4/ Nor does the subsequent mailing of a copy of the letter to Edward T. Weaver, executive director of the American Public Welfare Association demonstrate any impropriety. The suggestion of a conspiracy between Brezenoff and Weaver strains credulity and is not credited.

that defendant's actions constitute "covert reportage" and therefore demonstrate ill-will. The Court is convinced that Mr. Brezenoff in good faith felt that a letter to game retailers was an appropriate forum in which to respond to the accusations and "spoofs" promulgated by the game. He was unaware that there had been substantial media coverage of the game and he felt that a letter to newspapers would be insufficient and would probably remain unpublished as a debate over the promotion of a commercial vehicle.

The plaintiffs submitted the testimony of an unemployed, self-styled investigative reporter for a political news sheet, one Cathy Groudine, to indicate that there was something surreptitious about the letter. She claimed that when she learned of the letter she tried to obtain a copy and had difficulty in

obtaining one. From this, she concluded that the defendant tried to cover up the existence of the letter. However, the credible evidence on this side foray supports a contrary conclusion. Ms. Groudine's testimony only demonstrated her inability to personally speak to the defendant. On January 31, 1981, the defendant's staff promptly complied with a request received pursuant to New York City's Freedom of Information procedures and sent a copy of the letter to Ms. Groudine.

The letter did not express any factual information which was knowingly false or stated with a reckless disregard for its veracity. The defendant's conduct was neither negligent, reckless, nor grossly irresponsible. The credible evidence proves that the letter constitutes a combination of legitimately held

opinion and unassailed facts. The bulk of the letter contains factual statements concerning the size of welfare benefits, the demographic make-up of the welfare rolls and an evaluation of administrative efforts to reduce welfare abuses. Plaintiffs offered no credible evidence to dispute these representations and they were not intended as defamatory nor are they libelous.

The defendant stated it as his opinion that the perpetuation of myths that are inconsistent with the facts as he viewed them does a grave injustice to taxpayers and welfare recipients, that the game is insensitive and shoddy as well as a discredit to its manufacturers and marketers. The defendant offered his opinion that it would be a genuine public service for merchants not to sell such merchandise. Such an opinion could be and was honestly and reasonably held and

could be freely spoken by a person in Mr. Brezenoff's position without recrimination.

Given the totality of the circumstances surrounding the letter, the defendant's expertise as to factual matters concerning welfare and the specificity of the factual presentation in the rest of the letter, the last two paragraphs must be read as the type of "rhetorical hyperbole" that characterizes opinion. Moreover, it is obvious that the basis for defendant's opinion in the last paragraphs is the set of facts described in the remainder of the letter.

Mr. Brezenoff was justified in making an opinionated response to the game. As Administrator of Human Resources, he spoke for two constituencies that were directly assaulted by the game and its implications. Mr. Johnson admits that it was the plaintiffs' goal

to "make people mad" in order to sell games. The defendant's retort to the provocation in plaintiffs' attack was a reasonable reaction and not excessive. At times plaintiffs testified that part of their complaint with the defendant was that his retort was not as vocal nor as vociferous as those of Patricia Harris, et al. The Court finds that it was reasonable for the defendant to comment on the game, that his comment was reasonably restrained and that he chose an entirely proper means to voice his reactions to the game.

Finally, the defendant's lack of a motive to injure plaintiffs rather than to address the game itself, is illustrated by his complete failure to engage in any follow up on the letter. The plaintiffs voice the notion that the letter carried an implication to the retailers of a threat of governmental

harassment to them. Mr. Brezenoff did nothing to apprise others in any department of the City of his response or to invite any sort of governmental coercion to inhibit sales. He wrote no other letters and took no other action. Only two of the thirteen recipients even acknowledged receipt of the letter. In each of those cases the recipient applauded Mr. Brezenoff's viewpoint. The defendant's testimony that his sole purpose was to respond, not to censor, is accepted as entirely credible. Once he said what he had to say he took no further action to inhibit plaintiffs' sales.

III. Impact of the Letter

Perhaps the most damaging to the plaintiffs' case is their failure to present credible evidence that any potential distributors of the game refrained from marketing it because of the Brezenoff

letter. Plaintiffs attempted to make that suggestion through Mr. Michael Botti, a buyer for Brentano, who testified that he felt an implied threat from the letter and that this feeling influenced Brentano's decision in 1980 not to sell the game. Mr. Botti was unable to point to any specific language in the letter or subsequent actions of the defendant which he felt were threatening or intimidating. Mr. Botti's testimony was not worthy of belief; he was contronted with and directly contradicted by a letter from his own superior, Ms. Monica Hollander to Mr. Brezenoff dated November 13, 1980, stating on behalf of Brentano that Mr. Botti had refused to consider the game for purchase at that time due to its insensitive and distasteful content. Peculiarly enough, Mr. Botti did not actually see or examine

or evaluate a copy of the game until nearly a year after the letter went out, i.e., not until September 1981, and made no effort to obtain a copy of the game in the interim to see for himself. Parenthetically, as a matter of fact, Brentano in the following year, in 1981, changed its viewpoint and did carry the game.

No other recipient of the letter testified that he felt intimidated or threatened. Correspondence from recipients indicates that the game was either rejected before receipt of the Brezenoff letter or that the retailers felt that any decision concerning what was proper for them to sell was theirs alone to make.

Apparently, the defendant chose the wrong audience for his letters. Plaintiffs' expert, Mr. Dunnigan,

testified that only two of the stores, Brentano and F.A.O. Schwartz carry games that are comparable[5/] to "Public Assistance". Both of those stores stated that they had decided to reject the game before receiving the letter; moreover, both stores ultimately decided to carry the game in 1981.

The fact that the letter was on official Human Resources stationery does not appear to have intimidated any recipients, nor should it have. All of the letter's recipients are major retailers and except for speculation uttered by plaintiffs, there is no evidence that such retailers feel threatened easily. Human Resources had no function or authority to regulate any aspect of the business of retail stores.

5/ A comparable game would be an adult game addressing a political or social issue.

The defendant made no attempt to communicate with or enlist any City agency which did have authority to oversee or regulate the recipients of the letter. While there was testimony that the New York City Fire Department chose to make safety code inspections in December 1980 around Christmas shopping times, there is no evidence that connected those inspections in any way whatsoever as an ulterior threat or related them to the game in question. They were not improper. The City's inspections were not in response to or in support of the Brezenoff letter. Neither the licensing power nor the health and safety inspection power of the City of New York were shown to be associated with or supportive of the Brezenoff letter in any way.

Finally, it would be at best speculative to conclude that any store

in New York or elsewhere that did not carry the game, and was somehow connected with one of the letter's recipients, refused to carry the game because of the letter. The Court is convinced that if there were decisions of retailers made not to carry the game,[6/] those decisions were made either in response to the ongoing notoriety and general public controversy surrounding the game or due to the store's own standards of propriety and good taste. There is no evidence impliedly or specifically linking any decision to reject the game to the Brezenoff letter.

6/ There is some indication that Macy's ordered the game and subsequently cancelled its order and returned the merchandise. It appears that the game never actually reached the sales floor and the reasons for the returns were not adduced from or on behalf of Macy's, whether it was received too late for the holiday sales, or because of the controversy over the game, or for whatever other reason.

IV. Libel

Plaintiffs' demand for compensation from defendant Brezenoff for libel is utterly devoid of merit and borders on frivolity. The prima facie requirements of proof of libel were not met. The letter is not libelous per se, it does not tend to injure the plaintiffs in their business nor does it impute to them a quality which would be detrimental to their trade. See Bordoni v. New York Times Co., Inc., 400 F. Supp. 1223, 1227 (S.D.N.Y. 1975). The letter as a whole, given its plain and ordinary meaning, does not libel the plaintiffs whatsoever. Id. Moreover, there was no proof of falsity, the absence of which is a complete bar to recovery. Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y. 2d 369, 381, 366 N.E. 2d 1299, 1306, 397 N.Y.S.2d 943, 950, cert. denied, 434 U.S.969 (1977).

Plaintiffs would not be entitled to recover on the basis of a letter of this character in any event because the defendant was fully entitled to state his honestly held opinion. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 329 (1974); Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 941 (2d Cir.), cert. denied, 449 U.S. 839 (1980). Opinions are protected even when they contain emotionally charged or inflammatory rhetoric. Cf. NAACP v. Claiborne Hardware Co., 50 U.S.L.W. 5122, 5133 (July 2, 1982) (constitutional protection applies to emotionally charged speech). Since the letter sets forth the facts that are the basis of the opinion, it is fully protected and not libelous. Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d at 382, 366 N.E.2d at 1306, 397 N.Y.S.2d at 950.

The plaintiffs' scurrilous and

scathing attack on the welfare system and the beneficiaries thereof entitled, if not required, a response from a public official under the common law right of retort. Cf. Duffy v. Kipers, 26 A.D.2d 127, 271 N.Y.S.2d 338 (4th Dept. 1966) (a criticized public official may respond with or initiate defamatory statements in the course of his official duties). Similarly, fair comment on the attack is fully privileged. See Julian v. American Business Consultants, 2 N.Y2d 1, 7, 137 N.E.2d 1, 6, 155 N.Y.S.2d 1, 7 (1956).

In contrast to plaintiffs' unabashed criticism of the welfare system and its beneficiaries, the letter's response was restrained and fair in every sense.

The right to respond to the game's allegations is not diluted by the

defendant's status as a government official. Public servants are entitled to express their legitimately held opinions and have every right to speak out in the face of criticism they deem to be unfounded. See First National Bank v. Bellotti, 435 U.S. 765, 777 (1978); Grower v. State, 23 A.D.2d 506, 255 N.Y.S.2d 135 (3d Dept. 1965), aff'd 19 N.Y. 2d 625, 224 N.E.2d 899, 278 N.Y.S.2d 408 (1967).

Indeed, the defendant's administrative status renders him immune from liability for damages resulting from a claim of defamation. See Barr v. Matteo, 350 U.S. 564 (1959); Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978). Absolute immunity attaches when the government official acts, as here, within the scope of his official subject

matter. The immunity is applicable to actions for claimed damage due to libel and is absolute for a municipal officer since libel is not a constitutional tort. See Barr v. Matteo, 350 U.S. 564 (1959); C. M. Clark Ins. Agency, Inc. v. Maxwell, 479 F.2d 1223, 1227 (D.C. Cir. 1973).

In addition to absolute immunity as a public official, defendant also is protected by a qualified common law privilege to communicate with individuals who have an interest in the subject matter. See Clark v. McGee, 49 N.Y.2d 613, 621, 404 N.E.2d 1283, 1287, 427 N.Y.S.2d 740, 745 (1980). Communications with potential distributors of a controversial game are protected by this privilege. Cf. Shapiro v. Health Ins. Plan, 7 N.Y.2d 56, 60, 163 N.E.2d 333, 335-36, 194 N.Y.S.2d 509, 512 (1959) (privilege exists even if there is no legal duty to communicate).

Damage to commercial interests does not defeat the privilege. Zito v. American Federation of Musicians, 60 A.D.2d 967, 401 N.Y.S.2d 929 (4th Dept. 1978). Moreover, common law privilege is not contingent on broad publication of speaker's views. See, e.g., Commonwealth Motor Parts v. Bank of Nova Scotia, 44 A.D. 2d 375, 355 N.Y.S.2d 138, (1st Dept. 1974), aff'd 37 N.Y.2d 824, 339 N.E. 2d 888, 377 N.Y.S.2d 482 (1975).

The common law qualified privilege to communicate can only be overcome by a showing of common law "actual malice". Unlike constitutional "actual malice", infra., plaintiffs need only show ll-will or culpable recklessness or negligence. See Perfect Fit Indus. v. ACME Quilting Co., 494 F. Supp. 505, 507 (S.D.N.Y. 1980). The defendant's actions show no ill-will nor were they reckless or negligent; his qualified common law

privilege protects him against a claim of libel.

Recovery by plaintiffs is further barred by their failure to prove "actual malice" as required by New York Times v. Sullivan, 376 U.S. 254 (1964). Proof of actual malice -- that the defendant knew his statements were false or that he spoke in reckless disregard of the truth -- is constitutionally required when the libelled plaintiff is a public official or a public figure. Gertz v. Robert Welch Inc., 418 U.S. 323 (1974).

By injecting themselves into the welfare controversy for profit and to influence the resolution of the issue, the plaintiffs became public figures with respect to criticism of their welfare views. Id. Gertz does not require that plaintiffs' sole or dominant purpose be to influence the controversy. When they

injected their criticisms of the welfare system into the public forum by marketing and publicly promoting and exploiting their game, they created a constitutionally based protection for those who sought to rebut those criticisms. Plaintiffs had and employed substantial media access during this period to shape the public debate and were therefore prototypical limited purpose public figures.

Plaintiffs attempt to escape the New York Times requirement by defining the controversy as one relating to censorship. Such a limitation would emasculate the constitutional protection that has heretofore been required. In effect, plaintiffs' position is that whenever a party enters a medium to express an idea, no matter how scurrilous, distasteful or bogus, an individual who attacks that idea by criticizing its publication has

created a brand new controversy -- a censorship controversy.

Cases relied on by plaintiffs are inapposite. Mr. Brezenoff did not lift the plaintiffs out of obscurity and thrust them into the public forum. Thus the case is distinguished from Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (Senator Proxmire's award of "Golden Fleece" to a relatively unknown scientist). Nor was the defendant resurrecting an ancient controversy against plaintiffs' desires. See Wolston v. Readers Digest, 443 U.S. 157, 167-68 (1979). Finally, plaintiffs were not dragged unwillingly into a "cause celebre," see Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (prominent woman's divorce proceedings incorrectly characterized), rather they hoped for, profited from, and encouraged controversy.

The New York Times actual malice

standard has not been expressly limited to cases involving media defendants. Hutchinson, 443 U.S. at 133 n.16 ("This Court has never decided the question"). Moreover, the New York Times standard has been employed on behalf of non-media defendants even though the issue was not explicitly decided. See, e.g., St. Amant v. Thompson, 390 U.S. 727 (1968) (candidate for public office); Garrision v. Louisiana, 379 U.S. 64 (1964) (district attorney).

Finally, the defendant is entitled to constitutional protection even though he expressed his views in the form of a letter. There is no requirement that a defendant seek broad public circulation of his views in order to be protected by New York Times v. Sullivan. See Adey v. United Action for Animals, Inc., 361 F. Supp. 457, 461-62 (S.D.N.Y. 1973), aff'd, 493 F.2d 1397 (2d Cir. 1974) cert .

denied, 419 U.S. 842 (1974). See also Givhan v. Western Line Consolidated School Dist., 439, U.S. 410, 413 (1979). Thus, in order to recover for libel, plaintiffs must demonstrate actual malice on the part of the defendant. This has not been proven; therefore no recovery for libel can be had.[7/]

7/ As it must, New York law incorporates the constitutional protections for free speech. In libel cases New York expands the protection established in New York Times to cases involving private individuals where the matter under discussion is of public concern. See Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199-200, 341 N.E.2d 61, 63-64 (1975). In a case involving issues of public concern, a plaintiff must show that the defendant acted in a grossly irresponsible manner. Id. Thus, even if plaintiffs were not public figures for the purposes of the welfare controversy they could not recover under New York law. Plaintiffs suggest that Chapadeau should be limited to media defendants; for the reasons discussed above, the Court declines to do so.

V. Interference with Contractual and Commercial Relations

Plaintiffs have failed to establish prima facie proof that the defendant interfered with their contractual relationships or with their advantageous business relations. The elements needed to prove a claim of tortious interference with an alleged contract include proof of the existence of a valid contract, defendant's knowledge of that contract, defendant's intentional procuring of the breach of the contract and damages. Wegman v. Dairylea Cooperative, Inc., 50 A.D.2d 108, 376 N.Y.S.2d 728 (4th Dept. 1975). The elements needed to prove a claim of interference with an advantageous business relationship include proof that the defendant acted solely out of malice with the intention of harming plaintiff's business. See Shapiro v. Prudential Insurance Co.,

81 A.D.2d 661, 438 N.Y.S.2d 363 (2d Dept. 1981); Rosenberg v. Del-Mar Division, Champion Int'l Corp., 56 A.D.2d 576, 391 N.Y.S.2d 452 (2d Dept. 1977).

None of those elements have been proven. There is no proof that valid contracts existed between the plaintiffs and retailers. Apparently retailers could ask for as many games as they desired and could return games if they chose not to sell them. There was no evidence that the defendant had an idea which stores had been approached by the game's marketers in the year in question. The Brezenoff letter did not call for retailers to breach otherwise valid contracts and there was no proof that any retailer breached a valid contract and damaged plaintiffs as a result of the letter.

The defendant, as already stated above, did not act out of malice or with

the sole intention of harming the plaintiffs. He acted in his own legitimate self interest and for the interests of welfare recipients and administrators. Those legitimate goals leave his actions within the scope of the common law privilege to interfere with contracts or businesses when acting in one's own legitimate self interest. See, e.g., Felsen v. Sol Cafe Mfg. Corp., 24 N.Y.2d 682, 249 N.E.2d 459, 301 N.Y.S.2d 610 (1969).

Plaintiffs are not entitled to prevail herein for yet another reason; the defendant is immune from a claim of interference with contracts or businesses because he was acting within the scope of the subject matter of his official duties. For the reasons expressed above with respect to the claim of libel, a valid claim does not exist here, as well.

See Expeditions Unlimited Aquatic Enterprises, Inc., v. Smithsonian Inst., 566 F.2d 289 *D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978) (absolute immunity attaches even where defendant sends a letter that is critical of a business).

Finally, Mr. Brezenoff's constitutional protections of free speech entitle him to engage in public debate even if business interests are affected. See NAACP v. Claiborne Hardware Co., 50 U.S.L.W. 5122 (July 2, 1982); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

VI. Interference with Free Speech and Press -- Censorship

Plaintiffs assert yet another claim, viz., that Brezenoff's criticism of their game constitutes governmental censorship. This contention demonstrates

a complete misunderstanding of the protections afforded to all speakers -- private and public -- by the Constitution. A public official does not lose his unfettered right to express his opinion in non-defamatory words concerning the critical comments of zealots and others exercising like privileges by deed and word. The contra would put a silencer on the elected and selected leaders of the body politic. The Brezenoff letter was not censorship; it was an appeal to conscience and decency. The parties stipulated in their joint statement of facts that "Commissioner Brezenoff had the responsibility to express agency policy on social service issues and generally to inform the public concerning the programs of his agency".

Plaintiffs rely on Bantam Books v. Sullivan, 372 U.S. 58 (1962) which

interdicts informal governmental efforts to censor. Bantam Books is distinguished in a number of respects. There, the offending letter was written by the Commission to Encourage Morality in Youth, a body whose purpose was to inform vendors what material it was improper to sell. The letter suggested that prosecuting agencies would check-up and follow-up. In contrast, there was no threatened or actual follow-up to the Brezenoff letter; the lack thereof defeats a claim of censorship.

Additional cases cited by plaintiffs are equally inapplicable. In Bonner-Lyons v. School Committee, 480 F.2d 442 (1st Cir. 1973), the defendant was engaged in disseminating literature to a captive school audience where those with opposing views had no opportunity to reach the same audience. The plaintiffs could, and in fact did, write letters to

the recipients of the Brezenoff letter. Significantly, if the letter had any impact, it was to increase the opportunities of the plaintiffs to express their views in the media. In State Cinema v. Ryan, 422 F.2d 1400 (1st Cir.), cert. denied, 400 U.S. 850 (1970), the informal warning by the police and prosecutor threatened subsequent arrest and prosecution and is therefore irrelevant to the actions of the defendant, Mr. Brezenoff.

Plaintiffs also rely on Selfridge v. Carey, 522 F. Supp. 693, 697 (N.D. N.Y.), aff'd 660 F.2d 516 (2d Cir. 1981) to suggest that the defendant had an affirmative duty to protect the plaintiffs' right to sell the game. In Selfridge, the Court held that the state could not cancel a rugby match involving South African players because it feared

that violence would result. Unlike the visiting South Africans, the plaintiffs had numerous outlets for their games and their views and were in no way impeded from hawking either.

Even if the defendant had been engaged in censorship, he would have been protected by a qualified privilege with respect to a claim for damages resulting from his actions in his official area as long as he acted in good faith. See, e.g., Wood v. Strickland, 420 U.S. 308, 321 (1975).

VII. Conclusion

None of the theories of claim put forth by plaintiffs were supported by a fair preponderance of credible proofs or have legal merit.

Accordingly, the complaint and all the claims of the plaintiffs in this action are hereby dismissed on the merits, with costs.

The foregoing shall constitute the findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure.

SO ORDERED.

December 6, 1982

Milton Pollack
U.S. District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1111—August Term, 1982

(Argued April 7, 1983 Decided April 28, 1983)

Docket No. 83-7014

HAMMERHEAD ENTERPRISES, INC., RONALD PRAMSCHUFER, and ROBERT JOHNSON,

Plaintiffs-Appellants,

—against—

STANLEY BREZENOFF, MAYOR and CITY COUNCIL, and THE CITY OF NEW YORK,

Defendants-Appellees.

Before:

KAUFMAN and NEWMAN, *Circuit Judges*, and LASKER, *District Judge*.*

* Of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from a judgment entered, after a bench trial, on an order of the United States District Court for the Southern District of New York, Milton Pollack, *Judge*, dismissing appellants' complaint which alleged a violation of First Amendment rights. Appellants also challenge the rejection of their claims based on libel, defamation, and tortious interference with contractual relations.

Affirmed.

DAVID TICHANE, New York, N.Y., (Luther C. West, West, Carey, Frame & Barnstein, Baltimore, Md., *of Counsel*), *for Plaintiffs-Appellants.*

ARNOLD STREAM, New York, N.Y. (Frederick A. O. Schwarz, Jr., Corporation Counsel, Francis F. Caputo, George Gutwirth, New York, N.Y., *of Counsel*), *for Defendants-Appellees.*

KAUFMAN, *Circuit Judge*:

Social and political satire have long held a prominent place in the American literary landscape. From the witticisms of Benjamin Franklin to the pungent rhetoric of H.L. Mencken, our nation has been blessed with skilled linguistic craftsmen whose barbs and aphorisms have shaped the course of public debate. Nor have words provided the only medium for biting criticism of establishment shibboleths. Filmmakers like Preston Sturges

have lambasted our most sacred institutions and modern newspaper readers daily have taken delight in the trenchant cartoons of Garry Trudeau. Appellants, creators of a board game titled "Public Assistance—Why Bother Working for a Living" ("Public Assistance"), purport to be heirs to this grand tradition.

Public Assistance, fashioned in the style of Monopoly and similar adult parlor games, lampoons what appellants might label the "welfare bureaucracy." In their view, the game, which we shall later describe in detail, serves to inform the public of the wasteful and fraudulent nature of our system of distributing funds to deprived and disabled individuals. Others proffer a different outlook. Patricia Harris, former Secretary of the U.S. Dept. of Health and Human Services, for example, characterized the game as "vicious" and based on "false stereotypes that are callous, sexist, and racist." Similarly, appellee Stanley Brezenoff, Administrator of the Human Resources Administration of the City of New York, portrayed appellants as having launched "an ugly and damaging slam at this society's poorest citizens."

Our task, of course, is not to evaluate these competing perspectives. For it is beyond peradventure that regardless of our view of the wisdom and taste of appellants' creation, their right to market the game is protected by the First Amendment. This Court has repeatedly made clear that suppression of even the most unpopular or hateful ideas can have no place in a democratic society which depends upon an informed citizenry to exercise the precious right of self-government. *See Federal Election Commission* v. *Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 785 (1983); *Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977);

see also International Society for Krishna Consciousness Inc. v. *Barber*, 650 F.2d 430 (2d Cir. 1981), *vacated and remanded on rehearing*, No. 80-7709 (2d Cir. Sept. 29, 1981) (unpublished order).

This case, however, does not involve attempts by government to censor the unorthodox or the insurgent. Rather appellants ask us to protect them against a letter sent by Brezenoff simply urging various department stores not to carry the controversial product. Apparently, appellants believe the First Amendment shields their own critique from any form of official criticism. In our view, this approach would stand the Constitution on its head. The right to free speech guarantees that every citizen may, without fear of recrimination, openly and proudly object to established government policy. It does not immunize the challengers from reproach. Having boldly entered the flames of public discussion the First Amendment specifically is designed to kindle, appellants now seek our rescue from the sparks of controversy they ignited. In the absence of any evidence that Brezenoff or any New York City official attempted to do more than express his view concerning the distasteful nature of appellants' invention, we decline to come to their assistance. Accordingly, for the reasons stated below, we affirm the judgment of the district court dismissing appellants' complaint alleging violation of their First Amendment rights and other related injuries.

I

The public controversy surrounding appellants' satirical creation provides a sterling example of the "robust debate" which lies at the core of the First Amendment. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270

(1964). Because a complete understanding of this nationwide dispute and the game which provoked it are necessary to a proper disposition of this appeal, we set forth the underlying facts in some detail.

In the summer of 1980, Robert Johnson, an author and publisher, and Ronald Pramschufer, a printer with production and sales experience, concocted "Public Assistance—Why Bother Working for a Living." The game is played by rolling dice and moving pawns twelve times around the board, each trip representing a month of the year. Players attempt to accumulate as much money as possible as they proceed along two routes: the inside track, labeled the "Able Bodied Welfare Recipient's Promenade," and the outer circuit, designated "the working person's rut." As a reflection of appellants' view of the nation's welfare system, financial rewards come more quickly and easily to contestants traveling the inner circle. Indeed, Public Assistance seeks to present a striking contrast between the easy life allegedly enjoyed by recipients of public funds and the numerous obstacles purportedly confronting employed citizens. The game's working people are made to appear burdened by oppressive taxes, strangled by government regulations, and victimized by reverse discrimination. Conversely, those receiving welfare benefits are portrayed as lazy, dishonest and in some cases intoxicated and promiscuous individuals who take unfair advantage of government largesse. These players may procure additional monies by obtaining the assistance of an "ethnic lawyer" and by landing on squares marked "have an illegitimate child." Government officials who distribute funds are similarly depicted as lazy, tolerant of fraud, and easily duped by dishonest claimants. In sum, the game mocks the entire system of

public assistance this country has worked so hard to perfect.

Having completed the game's design, Pramschufer and Johnson began devising a strategy to produce and market the new product. Together they formed Hammerhead Enterprises, Inc., a Maryland Corporation, which by the fall of 1980 had secured financing and commenced manufacturing the first copies of Public Assistance. At the same time, the young entrepreneurs took steps to ensure that sales of the game which retailed for $15.95 would not depend upon mere word of mouth. They quickly contacted their local newspaper, the Annapolis Evening Capitol, and succeeded in obtaining an article describing their controversial creation and detailing the negative reactions of a local community agency representative. In light of the inflammatory nature of the game, it should come as no surprise that this initial effort to garner publicity soon resulted in the widespread media attention appellants so evidently desired.

The column in the Maryland paper was observed by the Associated Press which disseminated the story nationally during September and October of 1980. Pramschufer and Johnson, displaying no reluctance to highlight the game's outlandish nature, became regular guests on radio talk shows, appearing at least a dozen times closely following the AP report. In addition, Public Assistance was featured by Phil Donahue on the Today Show which invited Johnson to defend the game on network television.

Negative reactions were intense and immediate as outraged spokesmen for impoverished citizens entered the debate. Carl Snowden, a leader of a local anti-poverty group in Annapolis, joined Johnson on the Today show where Snowden denounced the game. The National Or-

ganization of Women, which condemned the game for "perpetuat[ing] myths and totally misrepresent[ing] the role of women on welfare," urged its members to take action against this form of amusement. The Maryland NAACP also called for a boycott of merchants carrying Public Assistance. As a result of these protests, certain stores in the Baltimore-Washington area allegedly cancelled orders for the new game which appellants had begun shipping in late October and early November 1980.

Stanley Brezenoff, the Administrator of the Human Resources Administration of New York City ("HRA") also reacted unfavorably to Public Assistance when he first encountered the game at a Washington, D.C. social gathering in late October 1980. After examining the game, Brezenoff became deeply concerned over the distorted impression of the welfare system which, in his view, would be conveyed to the public by appellants' attempt at satire. As the New York City official primarily responsible for administering the HRA's annual $3 billion budget, Brezenoff had previously spoken on numerous occasions concerning the provision of financial assistance to the needy. He now viewed it as his duty to express his disagreement with appellants' disparaging characterizations of welfare recipients and chose to voice his opinion in a letter written on official stationery and mailed on November 5, 1980 to 13 New York department stores.[1] Brezenoff discussed his decision with no city officials other than his assistant, Ann Whalen, who aided in drafting the challenged communication, and an HRA staff attorney.

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[1] The letter was sent to Abraham & Strauss; Alexander's; B. Altman & Co.; Bloomingdale's; Gimbels; Hammacher-Schlemmer; Lord & Taylor; Macy's; Saks Fifth Avenue; F.A.O. Schwarz; Brentano's; Barnes & Noble; and Toys-R-Us.

Brezenoff's letter, set forth in the margin,[2] urges the stores to refrain from carrying Public Assistance. It lauds recent improvements in the administration and management of the welfare system, and elucidates the harsh reality that a NYC family of four receiving public assistance is forced to survive on a meager $374 per month

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2 Brezenoff sent the following letter to the thirteen department stores and mailed a copy to Edward T. Weaver, executive director of the American Public Welfare Association, a private group attempting to thwart sales of the game:

Dear Mr. _____

As you may know, there is a new board game on the national retail market called "Public Assistance." I am writing to urge that _____ refrain from carrying this game in its stores.

"Public Assistance" is not, as its inventors claim, a harmless spoof of welfare cheats and liberal government bureaucrats. It is an ugly and damaging slam at this society's poorest citizens, 60 percent of whom are children.

A welfare family of four in New York City receives public assistance and food stamp benefits of $374 a month to cover everything—food, clothing, utilities, carfare, and the other necessities—except rent and medical care. That works out to about $3.01 per person per day. The maximum the family can receive for rent is $218 monthly.

Besides lampooning the painful financial situation of those who struggle to get by on that amount in this economy, the game also denigrates the very real progress over the past decade in reforming administration and management of the welfare system. Locally, error rates in payment and eligibility are now a fraction of what they were just seven years ago; caseloads are down to their lowest levels since 1972; and more able-bodied welfare recipients are being removed from the rolls and put to work in productive jobs than at any other time in the City's history.

The system is still imperfect, but we are working hard to improve it, and the "welfare mess" of the old days is gone.

By perpetuating outdated myths, I believe the "Public Assistance" game does a grave injustice to taxpayers and welfare clients alike; by its insensitivity and plain shoddiness, it is a discredit to those associated with its manufacture and marketing.

Your cooperation in keeping this game off the shelves of your stores would be a genuine public service.

With thanks and best wishes.

Sincerely,

(excluding rent and medical care). Brezenoff also expresses his opinion that appellants' creation "does a grave injustice to taxpayers and welfare clients alike." The letter closes with the exhortation, "Your cooperation in keeping this game off the shelves of your stores would be a genuine public service."

Brezenoff received two initial responses.[3] Monica Hollander of Brentano's wrote to express her store's "complete agreement" with Brezenoff's point of view, and to inform him that the store's buyer, Michael Botti, had decided before receiving Brezenoff's letter not to order Public Assistance. Peter Oechsle, President of F.A.O. Schwarz also sent a letter explaining that his store had rejected the game "several months ago."[4] Brezenoff took no further steps to trace the consequences of his correspondence. He did not investigate whether any merchants were in fact carrying the game nor did he contact any government agency which might have regulatory authority over New York department stores.[5] The HRA has no such administrative power.

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3 Subsequently, in March 1982, Brezenoff received a copy of a letter sent by Leonard Riggio, President of Barnes & Noble, to appellants' attorney, David Tichane. This correspondence revealed Riggio had read Brezenoff's November 5, 1980 letter and thrown it away.

4 Appellants correctly point out that their game had been on the market only a few weeks in November 1980 when F.A.O. Schwarz received the Brezenoff letter. Oechsle's exaggerated estimate of "several months," however, does not undermine the basic import of his letter that his store's decision not to carry Public Assistance was not influenced by the challenged communication.

5 Appellants' only allegation that Brezenoff invoked coercive government power is based on the unusual vigilance of New York fire inspectors during the 1980 Christmas season. No evidence, however, suggests Brezenoff ever communicated with fire department officials or that the inspectors singled out stores carrying the game.

Moreover, no credible evidence suggests that any store decided not to carry the game as a result of Brezenoff's letter. Michael Botti did initially testify that he had been influenced by Brezenoff's "strong request" when he decided not to order the controversial product. On cross-examination, however, he admitted that the November 13, 1980 letter sent by his superior, Monica Hollander, accurately informed Brezenoff that Brentano's had chosen not to sell Public Assistance before receiving Brezenoff's communication. In addition, Botti was unable to point to any language in the Brezenoff letter which he found threatening or coercive. Appellants also note that Macy's cancelled orders for the game it had placed prior to the 1980 Christmas season. The decision to cancel, however, may have been spurred by the continuing controversy in the press or by business reasons wholly unrelated to the Brezenoff letter. No Macy's official testified to explain the store's actions nor did representatives from any other merchant describe the choice each made not to carry the game.

The growing public controversy surrounding Public Assistance continued throughout the late fall of 1980. On November 30, 1980, the *New York Times* published an article describing the game and the negative responses it had provoked. Kathy Groudine, a struggling freelance writer, spotted the column and decided to write about the game for a Libertarian newspaper. In addition, the *New York Daily News* printed two stories concerning the game, the latter not only discussing the product but also mentioning the Brezenoff letter. In spite of all this publicity, or perhaps because of it, Hammerhead Enterprises sold 10,000 Public Assistance games during the 1980 Christmas season.

The *Daily News* article of December 15, 1980 informed Ms. Groudine and appellants of Brezenoff's efforts to dissuade stores from carrying the product. Ms. Groudine then attempted to obtain a copy of Brezenoff's letter by telephoning his office. She identified herself as an investigative journalist but was not permitted to speak with Brezenoff. After telephoning a freedom of information officer of the City of New York, Groudine received through the mails a copy of the correspondence she desired in February of 1981. On February 27, 1981, Pramschufer appeared on the Barry Farber radio show where he first had the chance to inspect Brezenoff's letter.

On May 20, 1981, Pramschufer, Johnson and Hammerhead Enterprises initiated this action against Brezenoff acting in his individual and official capacity, against the Mayor and the City Council of New York, and against the City itself. Appellants alleged the various defendants had violated their First Amendment rights. They also argued the Brezenoff letter was libelous, defamatory, and tortiously interfered with contractual relations. Jurisdiction was claimed pursuant to 28 U.S.C. § 1343 (jurisdictional counterpart of 42 U.S.C. § 1983) and 28 U.S.C. § 1332 (diversity).

During the course of litigation, appellants received, in September 1981, a list of the department stores to which Brezenoff had mailed the challenged letter. Thereafter, Hammerhead Enterprises was successful in persuading both Brentano's and F.A.O. Schwarz to carry the game for the 1981 Christmas season. Fifty-five thousand Public Assistance games were sold during 1981, primarily through small retail outlets.

A bench trial was held before Judge Pollack between September 28 and September 30, 1982. At the close of trial, the district judge dismissed the complaint against all

defendants except Brezenoff since no evidence was presented that they had participated in his decision to send the letter. On December 6, 1982, Judge Pollack also rejected appellants' claims against Brezenoff. Judge Pollack found Brezenoff acted in good faith when he attempted to persuade stores not to carry appellants' controversial game. The court also determined that Brezenoff's letter was "an appeal to conscience and decency" and in no way constituted illicit censorship. In addition, Judge Pollack concluded the Brezenoff letter was neither libelous nor defamatory since it was merely a statement of accurate facts and an expression of Brezenoff's personal opinion. Accordingly, the district court dismissed the complaint in its entirety. Pramschufer, Johnson, and Hammerhead Enterprises appeal.

II

A. *First Amendment Claim*

We have emphasized that "[courts] must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections." *Thomas* v. *Board of Education, Granville Central School District*, 607 F.2d 1043, 1047 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980). Even the most penetrating examination of Brezenoff's actions, however, reveals no violation of appellants' First Amendment rights. Instead, the record indicates that Brezenoff's request to New York department stores to refrain from carrying Public Assistance was nothing more than a well-reasoned and sincere entreaty in support of his own political perspective. And, although we share Judge Pollack's view that the letter was "an appeal to conscience and decency," Brezenoff's pleas

would have been equally immune from appellants' challenge had they been based on the views of a society which this or any court found wholly repugnant. *See Roth* v. *United States*, 354 U.S. 476, 484 (1957) ("unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of [constitutional] guarantees.")

Appellants invoke the spectre of government censorship. The record before us, however, shows this claim to be little more than a figment of appellants' collective imagination. We agree that, under certain circumstances, oral or written statements made by public officials will require courts to draw fine lines between permissible expressions of personal opinion and implied threats to employ coercive state power to stifle protected speech.[6] Where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated. Similarly, claimants who can demonstrate that the distribution of items containing protected speech has been deterred by official pronouncements might raise cognizable First Amendment issues. *See Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).[7] We have already noted, however, appellants cannot establish that this case involves either of these troubling situations.

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6 Since appellants have failed to establish any constitutional violation, we need not address the competing First Amendment considerations of Brezenoff's own right to speak.

7 Appellants' inability to prove that Brezenoff's letter could reasonably be viewed as threatening or that any one was in fact intimidated by his correspondence makes it unnecessary for us to determine whether the former, the latter, or both showings are requisite elements of a First Amendment violation.

Appellants' efforts to fit this case under the rubric of *Bantam Books, Inc.* v. *Sullivan*, *supra*, are entirely unsuccessful. In that case, the Rhode Island Commission to Encourage Morality in Youth, whose practices were invalidated by the Supreme Court, had explicit statutory authority to recommend prosecution of distributors of books and magazines who continued to display publications the Commission deemed objectionable for sale to individuals under 18 years of age. In addition, the Court accepted the state court's finding that distributors had ceased stocking protected communications after being intimidated by the Commission's official notices. By contrast, Brezenoff's letter refers to no adverse consequences that might be suffered by stores selling Public Assistance games, nor does the HRA have the power to impose sanctions on merchants who did not respond to Brezenoff's requests.[8] Moreover, the evidence indicates that not a single store was influenced by Brezenoff's correspondence. The challenged communication, therefore, was simply not part of an "informal system of censorship." *Bantam Books, Inc.* v. *Sullivan*, *supra*, 372 U.S. at 71.

Appellants' contention that Brezenoff's actions were unconstitutionally shrouded in secrecy is similarly without merit. The First Amendment does not require public officials to communicate only through the media, and

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[8] Appellants suggest that Brezenoff somehow engaged in "follow-up action" when he mailed a copy of the challenged letter to Edward Weaver, executive director of the American Public Welfare Association. The contention that merely writing to a private party constituted a government conspiracy to censor the controversial game is as spurious as it appears. Equally frivolous is appellants' reliance on fire inspections performed during the Christmas season of 1980. Appellants have demonstrated no connection whatever between these inspections and Brezenoff's activities. *See* note 5 *supra*.

Judge Pollack wisely found Brezenoff acted in good faith when he wrote the department stores directly. Brezenoff also promptly complied with Ms. Groudine's freedom of information request for a copy of the letter, and his refusal to speak with her on the telephone is hardly probative of an effort to hide his attempt to persuade merchants not to carry Public Assistance. Accordingly, we find Brezenoff did not violate appellants' First Amendment rights by sending the November 5, 1980 letter.[9]

B. *Libel*

Appellants' libel claim is based upon a fundamental misconception. They ask this Court to find defamatory Brezenoff's statement that the stores' cooperation in keeping Public Assistance off the shelves would be a genuine public service. From appellants' perspective, the suppression of public views is contrary to the spirit of our democracy and can therefore never be in the public interest. Accordingly, they argue Brezenoff's position is false and, since it was intended to impugn the integrity of those who designed the game, defamatory.

Whether or not we agree with Brezenoff's opinion concerning the societal value of the appearance of Public Assistance in department stores, this Court's role is not to pass judgment on the validity of his point of view. It is

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[9] Appellants also raise vague allegations of impermissible "infringement" of their right to speak. As we set forth in the text, we find nothing unconstitutionally odious in Brezenoff's conduct. This case does not involve an indirect *restriction* on appellants' exercise of political rights. *Cf. Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960) (invalidating local ordinance requiring disclosure of names of members in local NAACP since this "would work a significant interference with . . . freedom of association"). Rather, appellants are being "forced" only to endure a conflict with Brezenoff's own political views.

well settled that the Constitution does not permit the imposition of liability for expressing so-called "false ideas." *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974). Similarly, New York law protects the expression of "even erroneous opinion" against libel suits. *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 383, *cert. denied*, 434 U.S. 969 (1977). These salutary principles stem from the basic premise that a free people must depend upon the competition of conflicting ideas, and not the wisdom of judges, to arrive at the ultimate truth. Ironically, appellants would undermine the very principle they champion, by limiting Brezenoff's right to expound his belief that Public Assistance should not be circulated. The First Amendment contains no such limitation.

Moreover, nothing in Brezenoff's entire statement may be held libelous under prior rulings of this Court. The majority of appellee's letter sets forth facts concerning the operation of New York's welfare system and the accuracy of these assertions is not challenged in this litigation. The remainder of Brezenoff's exhortation merely reflects his view, based on these uncontested facts, that appellants' game is distasteful and damaging. This expression of opinion, however controversial, cannot form the basis for a libel judgment. *See Edwards* v. *National Audobon Society, Inc.*, *supra*, 556 F.2d at 121; *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977).[10]

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[10] Since we conclude Brezenoff's letter was not libelous, we need not consider whether appellants would be required to comport with the "actual malice" standard of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) or the "gross irresponsibility" standard set forth in *Chapadeau*

C.

Having carefully examined appellants' additional claims, we find them to be entirely without merit.[11] Appellants ask this Court to award them damages for injury they have not proved and to immunize them from criticism they have shown no reluctance to inflict on others. We decline to do so. Accordingly, the judgment of the district court is affirmed.

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v. *Utica Observer Dispatch, Inc.*, 38 N.Y.2d 61 (1975). We also need not determine whether Brezenoff's remarks were protected by an absolute or qualified privilege pursuant to the principles of *Clark* v. *McGee*, 49 N.Y.2d 613 (1980).

11 The district judge correctly determined appellants failed to show any participation by other City officials in Brezenoff's decision to send the letter. Since we find Brezenoff committed no compensable injury, the other defendants cannot be liable under the doctrine of respondeat superior.

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No. 83 - 127

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October Term, 1983

HAMMERHEAD ENTERPRISES, INC.,
RONALD PRAMSCHUFER, and
ROBERT JOHNSON

Petitioners,

-against-

STANLEY BREZENOFF, MAYOR and CITY COUNCIL and THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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QUESTION PRESENTED

Whether a letter sent by a local welfare administrator to the presidents of certain retail stores, which letter contains an opinion that the

stores would perform a genuine public service by not marketing a board game thought tasteless and offensive by the administrator, constitutes censorship, where the letter contains no threats, warnings, or suggestion of further action, and which letter the trier of fact found could not reasonably be viewed as threatening, and which letter the trier of fact also found had no effect or impact upon the retailers' decisions concerning the game.

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STATEMENT OF THE CASE

Petitioners seek to have this Court review by writ of certiorari an order of the United States Court of Appeals for the Second Circuit, entered April 28, 1983, which affirmed the order of the District Court, Southern District of New York, which, after a bench trial, found for defendants, on the merits, and dismissed the complaint. The opinions are reported at 707 F.2d 33 and 551 F. Supp. 1360.

Petitioners had brought suit under 42 U.S.C. 1983, and pendent state tort law claims, alleging that a letter, written by Stanley Brezenoff, Commissioner of Social Services of the City of New York, violated their First Amendment rights.

Petitioners are the manufacturer and creators of a board game called "Public Assistance - Why Bother Working for a Living." The game, described in some detail in the opinions of the Second Circuit

and District Court (A7-8, A51),* generated a great deal of controversy and widespread media attention, at the instigation of petitioners, who testified that "controversy sells games" ((JA363).

Brezenoff, the Commissioner of Social Services, administers welfare programs in the City of New York, and is a frequent spokesman for the poor on public issues regarding welfare. The Commissioner of Social Services exercises no licensing, inspection, taxing or regulatory authority over, nor has any relationship with retail stores (JA49-50, 430).

After seeing the game, Brezenoff was disturbed by its unfair and inaccurate portrayal of public assistance recipients, and believed that these inaccuracies required a response. Accordingly, he drafted a letter (reproduced in full in the Circuit Court's opinion (A54), sent to the presidents of

*Numbers in parenthesis, preceded by "A" refer to pages of petitioners' Appendix to their Petition. Numbers preceded by "JA" refer to pages of the Joint Appendix in the Court of Appeals.

thirteen retail stores in New York City, pointing out the game's inaccuracies, unfairness, and poor taste, and requesting that they not market it. Brezenoff testified at trial that he hoped to inform and thereby aid the stores in making a proper decision, and that he wished to persuade them that it was inappropriate to sell the game. He further testified that the letter involved no restraint, but simply gave his point of view.

The District Judge, the trier of fact, found credible Brezenoff's testimony that his sole purpose was to respond, not censor. The Court further found that the credible evidence showed nothing surreptitious about the letter, nor was it threatening. Rather, found the trial court, the letter was an appeal to conscience and decency.

Petitioners produced no credible evidence that any of the stores that received the letter regarded it as threatening, and no evidence that the letter caused them not to sell the game. The letter was found to have had no effect.

Petitioners did not call as witnesses any of the recipients of the letter, other than an employee of one of the stores, whose testimony was found to lack credibility (A21-23,56)*. Petitioners attempted to introduce testimony from persons who did not receive the letter, that if they had, they would have regarded it as threatening. The District Court rejected this proferred testimony as speculative and incompetent (JA 245, 275).

No credible evidence was produced to sustain petitioners' claim of a conspiracy between Brezenoff and Edward Weaver, director of the American Public Welfare Association (A15). The Second Circuit, on review, found the claim "as spurious as it appears" (A60).

*Among the numerous misstatements of fact in the petition is the statement on p. 12, ftnte 3, devoid of any basis in the record, implying that the letter had intimidated Brentanos from carrying the game. The record actually reveals that petitioners' own witness admitted that neither Brezenoff's views, nor the game's poor taste deterred the store from carrying the game, in response to customer requests, some months before Brentanos filed for bankruptcy (JA 386,391).

The trial court found that none of petitioners' claims were supported by a fair preponderance of credible evidence, or had legal merit, and dismissed the complaint, stating its findings of fact and legal conclusions in a detailed opinion (A1 - A46).

The Second Circuit affirmed, finding that the case did not involve censorship, as claimed by petitioners, but rather, was a matter of petitioners seeking to improperly use the First Amendment to shield their own critique from criticism (A50).

REASONS FOR DENYING A WRIT OF CERTIORARI

THE LETTER DOES NOT VIOLATE OR INFRINGE PETITIONERS' FIRST AMENDMENT RIGHTS. PETITIONERS FAILED TO DEMONSTRATE THAT THE LETTER HAD ANY IMPACT OR CHILLING EFFECT ON ITS RECIPIENTS, WAS INTENDED TO HAVE SUCH EFFECT, OR THAT ANY REASONABLE PERSON COULD SO REGARD IT.

Brezenoff's letter does not constitute censorship. It is a simple and direct statement of fact and opinion, precatory in tone and substance. There is no mention of any plan to take formal or informal action to prevent sale of the game. There is no threat of any type of punishment nor suggestion of any reward in connection with the decision of a store as to whether to carry the game. There is no claim of any authority to regulate the game in any fashion. There is no statement that the game is illegal or impermissable, only statements that in the writer's opinion it is in bad taste. There is not even a suggestion of a sanction, for none exists. Brezenoff was the Commissioner of a Social Service Department, responsible for the

issuance of food stamps and welfare checks, and had no official or business contact with department or toy stores. The recipients of the letter, the chief executives of major stores, would clearly know that they have no contact with, or regulation by, the Department of Social Services.

No recipient could reasonably regard the letter as threatening, and none, in fact, did. Petitioners failed to demonstrate by credible evidence that the letter had any impact on the retailers' decisions regarding the game, that the letter resulted in petitioners' loss of even a single penny, or that the letter was regarded as coercive or threatening by even a single recipient.

Petitioners' speculative discussion of the "possibility" of reading a threat into the letter presents no true issue, for the matter was specifically resolved, against petitioners, at trial, where they produced no credible evidence in support of the "possibility".

The presentation, in the petition, of other speculative scenarios does not warrant a grant of certiorari. To decide the issues raised by those hypotheticals on the record of this case would be tantamount to deciding a matter, not in litigation, on another set of facts. The case at bar has been decided on its facts and those facts showed petitioners' case to be without merit. The case presents no issue warranting review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

September 15,1983

Respectfully submitted,

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